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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,

v.

WAYNE and JUDY ACTON,
Guardians ad litem for James Acton,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE INSTITUTE FOR A DRUG-FREE WORKPLACE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Interest of *Amicus Curiae*

The Institute For a Drug-Free Workplace (the "Institute") is a non-profit coalition of private businesses and business organizations dedicated to preserving the interests of employers and employees in effective and responsible drug-abuse prevention programs.

Among other functions, the Institute disseminates information intended to positively influence the national, state, and local consideration of drug-abuse prevention issues and to assist corporate drug-abuse prevention and treatment programs.

The Institute also has extensive resources and collects and disseminates information pertaining to drug testing and to drug-abuse prevention programs. Most of the Institute's data on drug testing deals with employees in the private sector. However, because employees have been commonly tested and the results have been extensively analyzed, the employee drug-testing experience is highly relevant to other segments of American society as well, including those in educational and athletic settings that will be considered by the Court in this case.

The relevance of the Institute's positions to the case presently before the Court, which deals with urinalysis drug testing of student-athletes in a public school system, is further established because the Institute, its members, and the business community as a whole have an inherent interest in promoting drug-abuse deterrence and detection in schools. Students are the future — and frequently the current — employees of America. There is a great deal of corporate effort and financial support being directed to quality of education and work force preparation issues, and certainly the impact of substance abuse and the magnitude of the

problem in our schools are direct and legitimate employer concerns.

It is therefore obvious that decisions made in educational forums — including the decision made by the Court in this case — will have an impact on the workplace.

The Institute's goal in this brief is to assist the Court in assessing the societal interest in deterring and detecting drug abuse and the intrusion on individual privacy attendant upon urinalysis drug testing. Because the parties will be presenting thorough arguments addressing all aspects of the Fourth Amendment issues raised by this case, the Institute has endeavored to focus on those factual issues that are germane to the Court's analysis but about which the Institute has specific information. Towards this end, the Institute provides statistical evidence from its own and other studies. This *amicus* submits that the evidence supports the use of suspicionless testing of students as a means of deterring drug abuse and identifying individuals in need of assistance.[1]

Summary of the Argument

Drug abuse and its resultant harm are ubiquitous in American society at all levels and in all parts of the country. Because of this fact, the Court should not require a specific showing of a problem and harm for the student-athletes in Petitioner's school system. A compelling need to deter drug abuse should be presumed present rather than presumed absent.

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[1] Petitioner and Respondent have consented to the filing of this brief.

Urinalysis drug testing is an appropriate means of addressing this need. When properly conducted, such testing intrudes only minimally on individuals' privacy expectations. In addition, drug testing provides an effective means of deterrence and detection that cannot be achieved by other methods.

Argument

I. THE WIDESPREAD DAMAGE CAUSED BY DRUG ABUSE SHOULD BE GIVEN SUBSTANTIAL WEIGHT IN CONSIDERING THE NEED FOR DRUG TESTING.

"Drug abuse is one of the most serious problems confronting our society today." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989). The crisis exists for Americans at home, in the workplace[2] and in the schools.[3]

The magnitude of the national drug-abuse epidemic has received judicial recognition. The Court of Appeals for the Seventh Circuit in *Schaill by Kross v. Tippecanoe County Sch. Corp.* cited statistics declaring that 63 percent of high school seniors in Indiana had tried marijuana, and 23 percent of high school seniors across the nation as a whole had used marijuana in the preceding month alone. 864 F.2d 1309,

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[2] *See, National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989).

[3] The U.S. Supreme Court in *New Jersey v. T.L.O.* described drug abuse among students as one of the "particularly ugly forms" in which school disciplinary problems commonly arise in present-day America. 469 U.S. 325, 339 (1985).

1320 (7th Cir. 1988). Other courts have recognized the important role that schools should play in deterring and detecting drug abuse as well.[4]

Furthermore, our nation's drug-abuse problem is getting worse — in fact, substantially worse since 1989 when the U.S. Supreme Court last addressed the issue of drug-testing and upheld its use.[5] The Court should not retreat from its position articulated in *Von Raab*. 489 U.S. at 674. Indeed, it should give even greater recognition to the overall harm caused by drug abuse and to the appropriateness of drug testing as a means of addressing the problem. Empirical evidence confirms that drug abuse impacts all segments of society. There are *no* exceptions.

A. The Pervasiveness of Drug Abuse and Its Impact

Drug abuse — when committed by *any* segment of the population — has substantial human and economic costs. These include a direct and causal nexus to loss of life, personal injuries, property damage, loss of productivity, health care costs, and crime.

Nationwide studies of the general population show the prevalence of drug abuse and its devastating impact.

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[4] *See, e.g., Anable v. Ford*, 653 F. Supp. 22, 40 (W.D. Ark. 1985); *Bunger v. Iowa High Sch. Athletic Ass'n.*, 197 N.W.2d 555, 564 (Iowa 1972); and *Braesch v. DePasquale*, 265 N.W.2d 842, 847 (Neb. 1978).

[5] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).

According to the U.S. Department of Health and Human Services, illicit drug use decreased every year in the United States from its peak year of 1979 *until* 1993, when the rate of illicit drug use *increased*. An estimated 11.7 million Americans aged 12 and older (equalling 5.6 percent of the population) are current illicit drug users.[6] Furthermore, among students (aged 13-18), illicit drug use has *consistently* increased over the past four years.[7]

The prevalence of drug abuse is the beginning of the problem; its devastating effects are the culmination. Extensive research is not required to find a direct correlation between drug abuse and deaths, personal injuries, property damage, health care costs, and crime. In 1991, at least half of all people arrested for major crimes — including homicide, theft, and assault — were using illicit drugs at the time of their arrest.[8] More than 7,530 deaths were attributed directly to drug abuse in 38 metropolitan areas alone in 1992.[9] The number of deaths and debilitating

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[6] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *Preliminary Estimates from the 1993 National Household Survey on Drug Abuse* (July 1994).

[7] U.S. Department of Health and Human Services, *Monitoring the Future Survey* (December 1994).

[8] National Institute of Justice, U.S. Department of Justice, *1991 Drug Use Forecasting Annual Report*, 21 (1993).

[9] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *National Household Survey on Drug Abuse: Population Estimates 1992* (1993).

injuries *indirectly* related to drug abuse is substantially higher,[10] making the combined overall cost staggering.[11]

B. Drug Abuse Among Employees and Its Impact

Drug abuse by employees is relevant to the public school environment for three reasons. First, because nearly two-thirds of illicit drug users are employed,[12] the negative

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[10] Hospital emergency department episode statistics show the correlation between drug abuse and physical injuries. Approximately 466,900 hospital emergency department episodes were directly attributed to drugs in 1993. There were 46,800 drug-related emergency department episodes for persons aged 12-17 alone. *Preliminary Estimates from the 1993 National Household Survey on Drug Abuse, supra.*

[11] The combined overall cost of drug abuse to American society was estimated at $67 billion in 1990. This includes the expense of treating substance abuse, the productivity losses caused by premature death and the inability to perform normal activities, and costs related to crime, destruction of property, and other losses. Dorothy P. Rice, Institute for Health and Aging, University of California at San Francisco (unpublished data) (1990), *in* The Robert Wood Johnson Foundation Report, *Substance Abuse: The Nation's Number One Health Problem* (1993).

[12] *Preliminary Estimates from the 1993 National Household Survey on Drug Abuse, supra.* In addition, the latest SmithKline Beecham Drug Testing Index in which 9 million urine samples from the American work force were tested, showed that 8.41 percent of the 1.5 million employees and applicants who were tested for drugs at SmithKline Beecham Laboratories in 1993 tested "positive." SmithKline Beecham, *SmithKline Beecham Drug Testing Index — Trend and Rate Charts* (October 12, 1993).

In addition, 24 percent of full-time employees surveyed by the Gallup Organization said they had "personally seen or heard of" illicit drug use on the job, and 41 percent said that drug use in their workplace "seriously affects their ability to get the job done." *Survey of 1,007 Full-Time Employees, Aged 18 and Older, Working Outside of the Home* conducted for the Institute for a Drug-Free Workplace by the Gallup Organization. Princeton, New Jersey

and often dangerous effects of their drug abuse on themselves and others around them is indicative of the effects experienced by other groups such as students. Second, data on employees offer insights into the actual prevalence of drug abuse and drug-dealing in America as a whole and in diverse and widespread individual communities.[13] Third, it provides conclusive evidence on the effectiveness of drug testing as a deterrent.[14]

Approximately 11 percent of the work force abuses drugs or alcohol.[15] Drug abusers in the workplace are much more likely to cause accidents and have higher absenteeism rates, and above-average medical claims. One study, for example, showed that the U.S. Postal Service would have saved $52 million by 1989 had it screened out all drug-"positive" postal service applicants who were hired in 1987. Furthermore, after 2.4 and 3.3 years, employees who had tested "positive" were involuntarily dismissed at rates of 69.4 percent and 77.4 percent more often than "negative" testers, respectively. In addition, employees testing "positive" on preemployment drug tests were 59.4 percent more likely to be heavy users of leave in the first 1.3

(1989).

[13] A recent corporate survey reported that 85 percent of companies use drug testing. American Management Association, *Workplace Drug-Testing and Drug Abuse Policies* (1993).

[14] *See* Institute for a Drug-Free Workplace, *Does Drug Testing Work?* (1994) (summarizing over 40 major research studies and 39 corporate case studies).

[15] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1992 National Household Survey on Drug Abuse*. Advance Report Number 3 (June 1993).

years. After 2.4 years of employment, "positive" testers were absent for almost 10 percent of the total work hours scheduled.[16]

A Utah Power & Light case study showed that employees testing "positive" on preemployment drug tests, and who were subsequently hired, were five times more likely to be involved in a workplace accident than those who tested "negative." In addition, employees who tested "positive" on their preemployment drug tests were 1.7 times more likely than those testing "negative" to file above-average medical claims. Employees testing "positive" on their preemployment drug tests were 77 percent more likely to be fired in the first three years of employment, and were absent from work 66 percent more often than those who tested "negative."[17]

C. Drug Abuse Among Students and Its Impact

Drug abuse in schools presents an equally severe problem. Recent national statistics show that more than a third of all eighth graders, 40 percent of all 10th graders, and nearly 50 percent of all 12th graders have used illicit

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[16] Personnel Research and Development Branch, Office of Selection and Evaluation, United States Postal Service, *Preemployment Drug Testing: Associations with EAP, Disciplinary, and Medical Claims Information* (1992).

[17] Dennis Crouch, M. Birky, et. al., National Institute on Drug Abuse, *A Critical Evaluation of the Utah Power and Light Company's Substance-Abuse Management Program: Absenteeism, Accidents, and Costs*, Drugs in the Workplace: Research and Evaluation Data, 169-93 (1989).

drugs.[18] Furthermore, there is substantial evidence in the record that the Vernonia School District specifically faced a compelling drug-abuse problem among its student-athletes.

However, even if the evidence does not convince the Court that a serious problem existed in Vernonia, the Court should recognize drug abuse's overall impact on students across the country. It is unreasonable to require every school district, employer, or organization interested in using drug testing to conduct an in-depth study when *all* large-scale data demonstrate that a drug-abuse problem exists universally in America.[19] There is no basis on which to distinguish Vernonia from the rest of the United States. Therefore, a school system's administrator should be allowed to presume that drug abuse is a problem absent evidence to the contrary.[20]

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[18] U.S. Department of Health and Human Services, *Monitoring the Future Survey*, *supra*.

[19] As more and more data become available, and as society becomes more aware of the magnitude of the drug-abuse problem and its pervasiveness across America, specialized research as to the precise nature and existence of a particular problem, as would be required under some earlier lower court rulings, is rendered unnecessary and inappropriate. *(See, e.g., Brooks v. E. Chambers Consol. Ind. Sch. Dist.*, 730 F.Supp. 759 (S.D. Tex. 1989); *Derdeyn v. Univ. of Colo.*, 832 P.2d 1031 (Colo. App. 1991)). At some point, the preponderance of empirical evidence becomes so pervasive that assertions become facts. The existence of a major drug-abuse problem in our country has reached that level in 1995: it is a fact.

[20] The problem in schools is only getting worse. In 1992, 14 percent of 12th graders used illicit drugs in the last month. By 1994, the figure had increased to 21.9 percent of 12th graders. *Monitoring the Future Survey*, *supra*.

Once it is determined that drug abuse is prevalent, the harm associated necessarily follows. In the school setting, this harm undoubtedly includes the costs documented in the workplace, such as more accidents, absenteeism, and higher medical costs. It also includes the cost of inefficiency in teaching and learning due to disciplinary problems.

Drug dealing in America's schools — and the increasing problem of violence which is so associated with it — further compromise the educational system. When such illegal behavior is introduced and allowed to proliferate, it is a compelling and legitimate concern of school administrators, faculty, students, and parents.

The severe harm that drug abuse repeatedly has been proven to cause in the general work force, armed services, criminal and law enforcement, and student populations demonstrates that every school system has an interest in preventing drug abuse in its student population, and indeed, may have a responsibility to do so.

II. THE INTRUSION ON INDIVIDUAL PRIVACY OF PROPERLY CONDUCTED URINALYSIS DRUG TESTING IS MINIMAL.

A. Urinalysis Drug Testing and Privacy in the Act of Urination

Correctly established procedures minimize the intrusion on privacy in the act of providing a urine sample. The Institute has always fully acknowledged, as it must, that there exists a legitimate expectation of privacy as to the act

of urination.[21] However, the Institute submits that the intrusion on privacy occasioned by urinalysis is insignificant. In *Skinner*, the Court found that the intrusion on privacy in taking a blood test was insignificant because blood tests had become so commonplace in American society and involved virtually no risk, trauma, or pain. 408 U.S. at 625. The same principle applies to urinalysis. More than 47 percent of businesses interviewing college graduates in 1990 required drug tests before hiring.[22] The percentage is even higher in many "blue-collar" jobs that do not necessarily require a college degree, and which are considered safety-sensitive, such as most positions in the construction, trucking, petrochemical, mining, and shipping industries, and many jobs in the utilities and manufacturing sectors.

Furthermore, since 1989 when the Court decided *Skinner* and *Von Raab*, the number of companies that conduct periodic or random drug testing has increased tenfold.[23] Thus, today virtually every person entering the private work force knows or should know that he or she is likely to be subject to a drug test. Therefore, under the

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[21] "Company drug-abuse prevention programs should be implemented in a fair, consistent, and equitable manner with due consideration of the rights, responsibilities, and privacy interests of all concerned parties." Institute for a Drug-Free Workplace Mission Statement, as approved by its Board of Directors, and adopted by the Institute in 1989. Of course, the Court has specifically acknowledged this point: "The collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner*, 489 U.S. at 617 (1989).

[22] *Almost Half of U.S. Companies Will Require Drug Testing of College Grads This Year*, Daily Labor Report, May 9, 1990, at A-5.

[23] American Management Association Survey, *Workplace Drug-Testing and Drug Abuse Policies*, *supra*.

logic in *Skinner* regarding blood tests, the Court should find that the intrusion on privacy occasioned by urinalysis drug testing is likewise minimal. This conclusion is reinforced by the urinalysis procedural safeguards commonly in use that further minimize the intrusion of urinalysis *and* protect individuals' rights.[24]

The procedures developed by the U.S. Department of Health and Human Services, endorsed legislatively by the U.S. Congress, and commonly in use by the employer community, minimize the intrusion and serve as a guide for optimal urine collection procedures.[25] Two features of optimal procedures are particularly relevant to minimizing the intrusion on privacy in the act of urination.

First, sample collection may be conducted by independent trained professionals at an independent site. This limits the intrusion by likening the test to a medical examination, an environment in which individuals are

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[24] *Skinner*, 489 U.S. at 626; *Von Raab*, 489 U.S. at 672, n.2; *International Brotherhood Teamsters v. Dept. of Transportation*, 932 F.2d 1292, 1299 (1991); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (1st Dist. 1989) (no violation of California constitutional right of privacy where procedures were designed to minimize the intrusion).

[25] Optimal procedures should include the following provisions: (1) a secure collection site, (2) a private enclosure for urination, (3) direct observation limited to narrowly defined circumstances where the monitor may reasonably suspect the integrity of the specimen collection, (4) supervision by a licensed medical professional or an individual specifically trained in specimen collection, (5) rigorous chain-of-custody procedures, (6) use of a certified laboratory, (7) confirmatory assays for "positives," (8) use of a Medical Review Officer, (9) maintenance of strict confidentiality, and (10) referral to rehabilitation if a drug-test result is "positive."

accustomed to providing urine for analysis.[26] It has the additional advantage that the individual providing the specimen does not know, and is not known by, the technician collecting the sample.

Second, direct observation of the providing of the sample occurs only when reason exists to question the sample's integrity.[27] This procedure avoids unnecessary intrusions on privacy that courts have, in the past, prohibited.[28] Aural monitoring, in combination with other safeguards against adulteration may be used instead.[29] These procedures reduce the intrusion to an acceptable minimum since the expectation of privacy in the sound of urination is minimal outside the privacy of one's own home.

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[26] *Skinner*, 489 U.S. at 626-627.

[27] At least one court has found that monitoring urine testing to preserve the integrity of the sample does not constitute an unreasonable invasion of privacy. *O'Halloran v. Univ. of Wash.*, 679 F. Supp. 997 (W.D. Wash 1988), *rev'd on other grounds*, 865 F.2d 375 (7th Cir. 1988) (monitored testing of a college athlete to preserve the integrity of the urine sample is not an unconstitutional invasion of privacy).

[28] An example of an unnecessary invasion of privacy is found in *Anable v. Ford*, 653 F.Supp. 22 (W.D. Ark. 1985) (requiring a female student to disrobe entirely from the waist down and openly urinate into a tube while a school official of the same sex directly watched).

[29] Other adulteration safeguards include requiring removal of bulky outer garments such as a coat, prohibiting test subjects from bringing personal items such as purses and brief cases into the collection site, placing a bluing agent in the toilet water to guard against dilution, and using temperature strips on specimen containers to assure that the specimen temperature matches normal body temperature. Several courts have recognized the legitimacy of these procedures. *Schaill*, 964 F.2d at 1318; *Von Raab*, 489 U.S. at 672, n.2; *Skinner*, 489 U.S. at 626.

This is particularly true of athletes who, in most instances, share a bathroom with all other team members.[30]

B. Urinalysis Drug Testing and Privacy in Information Obtainable From Urine

Appropriate drug-testing procedures also minimize the potential for intrusion on privacy of information obtainable from urine. There exists a legitimate expectation of privacy as to the information that can be obtained from urine.[31] Analysis of urine can reveal pregnancy, epilepsy, and diabetes, as well as other legitimately personal and private medical conditions.[32] In urinalysis drug testing, therefore, the information taken from the urine sample should be narrowly prescribed so as not to reveal any additional

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[30] Two circuit courts have gone beyond finding a diminished expectation of privacy as to the sounds of urination and have found that athletes have an *overall* diminished expectation of privacy. In *Schaill*, the court found that the high school athletes' expectation of privacy was diminished because they were already subject to medical examinations and were part of a highly regulated group. 864 F.2d at 1317-1318, *citing Von Raab*, 489 U.S. at 678 (finding a diminished expectation of privacy if the group is already subjected to tests invading on privacy) and *Skinner*, 489 U.S. at 627 (finding that persons, such as railway employees, in a highly regulated industry, such as railroads, have a diminished expectation of privacy). The Ninth Circuit cited with approval *Schaill's* finding of diminished expectation of athletes in *International Brotherhood of Teamsters*, 932 F.2d at 1302.

[31] *Skinner*, 489 U.S. at 617 ("It is not disputed that chemical analysis of urine... can reveal a host of private medical facts about an employee."); *Id.* at 625 (breath tests are less intrusive because they reveal no other facts that a person is concerned about); *Von Raab*, 489 U.S. at 671. ("Interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances.")

[32] *Skinner*, 489 U.S. at 617.

medical facts. In this regard, the procedures surrounding urinalysis have been highly regulated and refined by various Federal agencies (in some cases at the direction of the U.S. Congress), the employer community, the medical profession, laboratories and their certifying organizations, and state legislatures and regulatory agencies.

This intense level of scrutiny and regulation has led to procedures that prevent access to information in urine which should not be divulged, thereby minimizing the privacy intrusion.[33]

In addition to the effectiveness of these procedures in limiting information taken from the urine, the potential tort and contract liability for improper disclosure or taking of medical information provide further checks and balances, thereby assuring to the person providing the sample that his or her privacy interests will be honored. For these additional reasons, the risk of a privacy intrusion with respect to the information contained in the sample is minimal.

C. The Increased Use and Acceptance of Urinalysis Drug Testing in Private Sector Employment Has Reduced the Societal Expectation of Privacy Relative to Providing a Urine Specimen.

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[33] The courts have recognized that the procedural safeguards commonly in use minimize the intrusion and protect individual rights. *See*, *supra*, n. 20. For example, strict chain-of-custody procedures prevent the sample from being diverted and tested for conditions other than the presence of illegal drugs. Additionally, the use of an independent laboratory prevents the institution requiring the test from exerting influence over the tester to extract inappropriate information.

"Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978). Moreover, the Fourth Amendment's protection do not extend to an individual's subjective expectation of privacy, but only to an "expectation that society is prepared to recognize as 'reasonable'." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Oliver v. United States*, 466 U.S. 170, 177 (1984).

In considering whether a specific expectation is reasonable, the Court, therefore, must examine the societal respect accorded that expectation. Technological advances create new avenues for intrusion upon expectations of privacy, as well as new vehicles for protecting such expectations. Testing of blood, hair, or tissue samples for DNA is being used to provide evidence in connection with criminal prosecutions — and defenses. Donated blood is routinely tested for presence of HIV; however, new products and procedures for the handling of blood and for activities where exposure to blood is possible make it reasonable to protect an individual's desire to keep confidential his or her HIV+ status in many situations.

A central issue in this case is: What is society's expectation with respect to the privacy interest to be accorded urine sample collection for drug testing? Testing for drug metabolites is, from a Constitutional perspective, a new phenomenon. Widespread use within American society of highly accurate urinalysis technologies for drug testing is a development of the last decade. In 1983, only three percent of the Fortune 200 companies conducted drug testing

of one or more classes of job applicants or employees. By 1991, this percentage had risen to 98 percent.[34]

In other words, among the country's largest employers, the procedure had gone from virtually unknown to nearly universal. The societal expectation, therefore, is that, in the workplace context, everyone will be tested at some point for drugs. Furthermore, the overwhelming majority of tests are conducted using urine, which is collected from the individual to be tested using procedures that generally conform to those used by Petitioner.

The Institute urges the Court to consider both the current societal expectation of privacy with respect to urine collection for drug testing and the trend in that expectation, which is decisively away from greater protection. The reduced sense of intrusion occasioned by urinalysis procedures is a composite, reflecting the increased use of analytic medical procedures generally for a variety of purposes, public concern over the drug crisis nationally, widespread institution of drug testing by private entities where no "search and seizure" constraints exist, and the use of highly accurate, verifiable tests combined with non-discretionary and frequently regulated procedures to protect individuals' privacy rights. The expectation that urination will be a private function may still be the norm. However, collection of a urine specimen for drug testing under now

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[34] The Business Roundtable, *Corporate Membership Surveys*, New York, New York (1983, 1991).

standardized conditions is, from a societal standpoint, viewed as a minimal intrusion on individual privacy.[35]

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[35] In addition, suspicionless administrative searches — such as those drug tests conducted according to the policy of the Vernonia School District — are in some ways less intrusive than "cause"-based searches. A significant problem created by drug testing is the implication that if an individual is selected to take a test, he or she "must have a drug problem." This issue arises frequently in employment-related situations where, for example, a truck driver must be removed from his position pending the results of a drug test, which can take several days to obtain. In the meantime, other employees are frequently aware that the individual is not working. Even if the employee is on paid administrative leave and the reason for the leave is kept confidential, co-workers will often surmise why their colleague is not on the job. Identical inferences will and do occur in the school setting. The result is that tested individuals will frequently complain that being sent for a drug test is defamatory or places them in a false light, even if they ultimately "pass" the test itself.

The "suspicionless" test absolutely and completely avoids this significant problem. Both universal initial screening (such as preemployment testing) and random testing have this feature. An individual sent for a test because a random-identification system selected that person's name carries with it no onerous inferences.

Furthermore, such a system has the advantage of entirely eliminating the highly subjective determination of probable or reasonable cause testing. Visual observations by teachers, administrators, or coaches are subject to both disparate interpretation and outright abuse. (Would it be too much to expect that a teacher with a problem student might find it necessary to send the student for a test based on his "behavior"? How would school officials take into account special education students who are emotionally disturbed and require medication, yet whose medical conditions are statutorily confidential?) Suspicionless testing does not solve the problem of determining when to send a person for drug testing based on individualized suspicion of impairment. The important point is that suspicionless testing itself does not raise — and completely avoids — certain concerns inherent in "for cause" testing. Since the purposes of the testing are deterring drug use and identification of young people in need of help, and not for referral for criminal prosecution, these dual features of objective criteria and lack of opprobrium for selection should weigh very heavily in

III. IN ADDITION TO BEING MINIMALLY INTRUSIVE, URINALYSIS IS AN EFFECTIVE, ACCURATE, AND WIDELY ACCEPTED MEANS OF DETERRING DRUG ABUSE AND IDENTIFYING INDIVIDUALS IN NEED OF DRUG REHABILITATION.

A common argument against urinalysis drug testing is that less intrusive methods are available to deter and detect drug abuse. Although other methods of drug-abuse prevention such as visual observation, self-reporting, and drug education and awareness programs are available, alone they are insufficient in deterring and detecting drug abuse or in identifying individuals in need of rehabilitation or treatment. Drug testing, in combination with these and other measures, adds a level of effectiveness that is absolutely necessary in many settings to combat drug abuse.

A. Urinalysis Drug-Testing Programs Effectively Deter Drug Abuse.

Urinalysis drug testing effectively deters and detects drug abuse. Urinalysis has a high detection rate, detecting virtually all individuals who have proximately engaged in illicit drug use, including those who are "in denial."[36] Urinalysis is also highly accurate and virtually *never* produces "false positives," and very seldom produces "false negatives" (which are, of course, of much less concern than

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favor of Petitioner's drug-testing policy.

[36] Individuals with a substance abuse problem frequently deny that the problem exists. For this reason, it is often futile to expect such individuals to submit themselves voluntarily to rehabilitation, to seek help on their own, or to recognize the damages they pose to themselves and others.

"false positives"), when conducted with a confirmatory test and reviewed by a Medical Review Officer.[37]

This combination of a high detection rate *and* a high accuracy level creates certainty for those engaged in illicit drug use that their use will be detected. Millions of Americans do not feel they will be caught by their employer, or the police, or that their substance abuse will cause harm or injury to themselves or others. Therefore, they perceive no downside risk to engaging in illicit drug use when no drug-testing program is in place. However, the business community recognizes that millions of Americans have stopped illicit drug use because of workplace drug testing and this, in fact, has been the experience of thousands of employers, including virtually all Institute members. Urinalysis increases the risk of loss of employment for employees, or denial of employment for job applicants, to a greater level and thus makes the downside risks of illicit drug use unacceptable to millions of Americans.[38]

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[37] The accuracy of urinalysis was noted in *Von Raab*, 489 U.S. at 672, n.2, and is supported by empirical studies. In 31 laboratories across the United States, 1,486 samples were tested for the presence of marijuana, amphetamines, cocaine, opiates and phencyclidine (PCP). Of the 1,486 trials conducted, there were no "false-positive" test results. Due to 45 "false negatives", the overall accuracy rate of urinalysis was 97 percent. Christopher S. Frings, Danielle J. Battaglia, and Robert M. White, *Status of Drugs-of-Abuse Testing in Urine Under Blind Conditions: An AACC Study*, Clinical Chemistry, Vol. 35, No.5, 891-894 (1989).

[38] Contrary to the dissenting opinions in *Von Raab*, 489 U.S. at 683, and *Skinner*, 489 U.S. at 634, empirical studies prove that drug users view testing as a more powerful deterrent than concern over their own welfare, or safety, or that of other persons. A 1987 study by the U.S. Navy found that 87 percent of personnel said random testing was the Navy's strongest deterrent to drug abuse. More than 27 percent said that they would resume their use of illicit drugs if the Navy discontinued its drug-testing program. Rear Admiral

Urinalysis drug testing therefore creates a credible and effective deterrent. The "fear of being caught" — and the attendant higher level of accountability — are effective deterrents to student-athletes in the scholastic setting as well.

The deterrent effect of urinalysis drug testing is supported by various empirical studies and by the dramatic increase in urinalysis programs in the past few years. In virtually every situation where urinalysis drug testing has been implemented, drug abuse and the harm associated with drug abuse has decreased, including the Vernonia School District.[39] Nationally, the overall decrease in drug abuse in America corresponds with the dramatic increase in urinalysis drug-testing programs.[40] While greater awareness of the damage of drug abuse also is undoubtedly a major factor in the decline in drug abuse, the number one factor is the widespread employer implementation of substance-abuse prevention programs, especially those including drug testing as a vital component. Specifically documented decreases are found in declining "positive" test

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P.J. Malloy, USN (Ret.), *Winning the War on Drugs — Check the Military*, The Drug-Free Workplace Report, Fall 1990, at 4.

[39] "Every teacher who testified had noticed an improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of drug culture since the Policy was implemented." *Acton v. Vernonia Sch. Dist. 47J*, 23 F.2d 1514, 1524 (9th Cir. 1994). *See also*, Institute for a Drug-Free Workplace, *Does Drug Testing Work?*, 61-102 (1994) (summary of 39 corporate case studies showing the deterrent effect of drug testing).

[40] Approximately 15 million Americans were tested for drugs in 1993, up from about seven million in 1987. *Does Drug Testing Work?*, *supra*, at 29. Random drug testing alone has increased 1,200 percent since 1987. American Management Association Survey, *supra*.

rates among the group tested,[41] declines in the number of drug-related accidents,[42] and declines in other costs and negative effects of drug abuse.[43] Finally, the increase in drug testing alone indicates its effectiveness, as employers and other institutions would only implement and pay the

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[41] In 1980, a survey of Navy enlisted personnel revealed that 48 percent had used illegal drugs in the month preceding the survey. One year later, after initiating a universal random drug-testing program, the survey findings were confirmed — 48 percent of those tested were "positive" for drugs. By 1988, however, that number decreased to less than five percent. *Winning the War on Drugs — Check the Military*, *supra*, at 4. Similar results were found in corporate studies by Occidental Chemical, Emergency One, Brown & Root, and Chicago Northwestern Transportation Company, among many others. *See Does Drug Testing Work?*, *supra*, at 61-102.

[42] Two studies typify the decreases in accidents that accompany a drug-testing program. The Construction Industry Survey on Substance Abuse (1992) found that in companies where substance-abuse testing was implemented, there was an overall 40 percent decline in substance-abuse-related incidents. The study also showed an overall decline in workplace accidents of 34 percent. National Association of Plumbing-Heating-Cooling Contractors, *The Construction Industry Survey on Substance Abuse* (April 1992). Another example is provided by Southern Pacific Railroad. After implementation of a drug-testing program, between 1984 and 1988, injuries decreased 71 percent. Train accidents due to human failure also decreased by 88 percent. R.N. Taggart, *Results of the Drug-Testing Program at Southern Pacific Railroad Study*, Drugs in the Workplace: Research and Evaluation Data, NIDA, 97-108 (1989). For other similar findings, *see generally*, *Does Drug Testing Work?*, *supra*, 61-102.

[43] Upjohn Company provides an example of the typical decreased costs associated with drug abuse when a drug-abuse prevention program is implemented. The gross savings due to the drug-abuse prevention program were calculated at more than $1 million in 1993. Reduced absenteeism and reduced turnover were responsible for savings of $450,000 and $349,000, respectively. *Does Drug Testing Work?*, *supra*, at 100. For other examples, *see Does Drug Testing Work?*, 61-102.

substantial cost of a program that had been proven effective.[44]

B. Less Intrusive Methods of Deterrence and Detection of Drug Abuse Often Are Not Sufficiently Effective.

Less intrusive methods of deterrence and detection of drug abuse, such as visual observation, self-referral, and drug education and awareness programs, are not as effective as urinalysis drug testing and often do not sufficiently deter and detect drug abuse. Every alternative method that does not involve a form of chemical testing has shortcomings that limit the percentage of drug abusers that are deterred from use or detected.

The primary shortcomings of visual observation are its limited detection rate and its inherent subjectivity and inaccuracy. Visual observation alone cannot detect all, or even a substantial portion of, drug-impaired individuals. Often individuals are either not adequately supervised to be

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[44] The increase in the number of drug-testing programs in place is confirmed by several studies. For instance, the Workplace Drug-Testing Programs American Management Association Survey (1993) reported that a record 85 percent of companies were conducting drug testing — a 14 percent overall increase since 1991. American Management Association Survey, *supra*. Similarly, a survey of employers interviewing at Michigan State University in 1990 reported that of the 479 businesses it surveyed, 47 percent require new college graduates to pass a drug test before being hired; up from 32 percent in 1989. Furthermore, among companies that were not currently requiring testing, nine percent planned to initiate such a program within a year and 11 percent within two years. *Almost Half of U.S. Companies Will Require Drug Tests of College Grads This Year*, Daily Labor Report, May 1990, at A-5.

noticed when impaired or are able to avoid detection by hiding their impairment from others.[45] Because of these lower detection rates, individuals do not fear being caught and are not deterred from use. Visual observation is also inherently inaccurate because observers are not always adequately trained or qualified to make assessments of impairment. This results in both false allegations of impairment and false assessments of fitness, again decreasing the deterrence value and detection rate of visual observation.

The most significant shortcoming of self-referral programs is that they do not detect drug abusers who deny that they have a problem. Drug-dependent individuals frequently do not recognize, and/or often are in psychological denial regarding their dependency. The ineffectiveness of self-referral programs compared to chemical analysis programs has been documented in the workplace and prison settings.[47] In fact, in the workplace, self-referral detects at *most* half as many drug abusers as does chemical analysis in combination with education.[48]

Finally, drug education and awareness programs often do not prevent drug abuse because drug abusers commonly believe that they can function safely and adequately even

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[45] Obviously, the fact that many individuals are able to conceal their drug abuse does not mean that they are able to function safely.

[47] *See generally*, R. Cook, A. Bernstein, and C. Andrews, *Assessing Drug Use in The Workplace:A Comparison of Self-Report, Urinalysis and Hair Analysis*, unpublished paper (1994).

[48] The actual drug use prevalence in the workplace is likely to be approximately 50 percent higher than the estimate based on self-reports. It may be even higher because some subjects refused to take part in this study. *Assessing Drug Use in the Workplace*, *supra*, at 18.

after proximately engaging in substance abuse.[49] Thus, despite educational efforts, fear of causing an accident or harm to themselves or others does not sufficiently deter drug abusers from using drugs even in dangerous situations. This is evident in statistics on highway fatalities,[50] and in statistics on workplace injuries.[51]

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[49] This belief is reflected in the number of drug abusers who admit to using drugs on the job. According to unpublished data from the 1991 National Household Survey on Drug Abuse, 15 percent of drug users and six percent of heavy alcohol users responded that they had been high or drunk on the job in the last year. For workers who entered treatment programs, two-out-of-five reported working under the influence at least once a week prior to treatment. *Preliminary Estimates from the 1991 National Household Survey on Drug Abuse*. Advance Report No. 3, *supra*. Additionally, a 1987 survey of individuals who called the National Cocaine Helpline seeking help in regard to their drug problem revealed that 75 percent had used drugs on the job. National Cocaine Helpline, *800-COCAINE* (1987).

[50] Of truck drivers fatally injured in over-the-road vehicle accidents, one or more drugs were detected in 67 percent of the drivers and 33 percent of the drivers had detectable blood concentrations of psychoactive drugs or alcohol. D. Crouch, M Birky et. al., *Prevalence of Drugs and Alcohol in Fatally Injured Truck Drivers*, 38 J. Forensic Sci. 1342-53 (1993). An analysis of the toxicology reports from 829 over-the-road vehicle fatalities in 23 states — which represents 28 percent of all such fatalities — revealed that more than 11 percent of the victims were "positive" for one or more illegal drugs. W.M. Marine, B. Derstine, and T. Jack, Bureau of Labor Statistics, *Analysis of Toxicology Reports from the 1991 Census of Fatal Occupational Injuries* (1991). Additionally, preliminary results from the Federal Highway Administration's (FHWA) four-state roadside testing program place the "positive" rate for truck drivers at 3.9 percent for illicit drugs in 1993. Federal Highway Administration, U.S. Dept. of Transportation, *Random Roadside Testing Pilot Program*, (1993).

[51] For example, employees testing "positive" on preemployment drug tests at Utah Power and Light were five times more likely to be involved in a workplace accident than those who tested "negative." *A Critical Evaluation of the Utah Power and Light Company's Substance Abuse Management Program:*

The lessened effectiveness of these programs when not implemented in conjunction with drug testing is further indicated by the growing prevalence of urinalysis in American society. This increase is directly attributable to the realization of organization leaders that the less intrusive methods in place in their organizations were not addressing the problem. The School Board in Vernonia is representative of thousands of organizations across the United States in this regard.[52]

C. Employees Recognize that Drug Testing is a Necessary Tool for Combatting Drug Abuse.

Studies conducted by the Institute have repeatedly demonstrated employee acceptance of drug testing as a necessary tool for combatting drug abuse at their workplaces and in their communities. The Institute has conducted 19 Gallup surveys — 17 state surveys, and national surveys in the United States and Canada. In all, the surveys involved more than 10,700 employees. The vast majority of employees expressed strong support for their employers' role in the "war on drugs," including drug testing. A majority

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Absenteeism, Accidents, and Costs, supra. Similarly, personal injuries and accidents dropped dramatically at Southern Pacific Railroad since the implementation of drug testing. Injuries dropped from 2,234 in 1983 to 322 in the first six months of 1988 (which at an annualized rate would be 644, a 71 percent reduction). Train accidents due to human failure also decreased from 911 in 1983 to 54 in the first part of 1988 (108 at an annualized rate, or an 88 percent increase). *Results of the Drug Testing Program at Southern Pacific Railroad, supra*.

[52] Brief for a writ of certiorari for Petitioner at 11, *Vernonia Sch. Dist. 47J v. Acton*, 23 F.3d 1514 (9th Cir. 1994) (No. 94-590) (Vernonia only implemented drug testing after other methods of deterrence and detection failed.)

of workers in all surveys viewed drug testing as a necessity,[53] and supported a drug-testing program in their own workplaces.[54] More than 90 percent of the employees in the national U.S. survey thought it was a "good idea" to test persons in safety-sensitive jobs such as airline pilots, transportation workers, and truck drivers. More significantly, substantial majorities of employees also favored testing of factory workers (73 percent), office workers (61 percent), and workers "in their own occupations" (69

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[53] In the national U.S. survey, 68 percent of the respondents thought that drug testing was a necessity or something that should be done. An additional 28 percent thought drug testing should be used in certain circumstances. Only three percent of the respondents felt that drug testing was not needed. *Survey of 1,007 Full-Time Employees, Aged 18 and Older, Working Outside of the Home*, conducted for the Institute for a Drug-Free Workplace by the Gallup Organization. Princeton, New Jersey (1989). The state surveys showed similar results. The Georgia survey showed the most employees in support of drug testing, with 79 percent saying drug testing was a necessity, an additional 20 percent supporting testing in limited circumstances, and only one percent saying drug testing was not needed. *Survey of 807 Georgia Employees*, conducted for the Institute by the Gallup Organization. Princeton, New Jersey (1994). Massachusetts employees were at the opposite end of the spectrum in the states surveyed, but *still* very supportive of drug testing, with 50 percent saying drug testing was a necessity, an additional 45 percent supporting testing in limited circumstances, and five percent saying drug testing is not needed. *Survey of 500 Massachusetts Employees*, conducted for the Institute by the Gallup Organization. Princeton, New Jersey (1991).

[54] In the national U.S. survey, 60 percent supported a drug-testing policy in their own workplace, and only 24 percent were against one. *Survey of 1,007 Full-Time Employees, Aged 18 and Older, Working Outside of the Home, supra*. The state surveys varied with a high level of support of 77 percent in Texas, *Survey of 500 Texas Employees*, conducted for the Institute by the Gallup Organization. Princeton, New Jersey (1991), and a lower — but still high — level of support of 57 percent in Pennsylvania. *Survey of 411 Pennsylvania Employees*, conducted for the Institute by the Gallup Organization. Princeton, New Jersey (1994).

percent).[55] In sum, more than two-thirds of employees in effect said, "you should test me."

These Institute Gallup surveys are strengthened by other similar surveys of smaller groups.[56] In addition, a 1987 survey of Navy personnel revealed that 83 percent considered random testing the Navy's strongest deterrent to drug abuse.[57]

Similarly, a study of 919 union members from 13 major unions revealed that nearly 77 percent support a policy of drug testing when individual privacy is protected.[58] The primary reason for the support: drug testing is an effective deterrent.

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[55] Although only the national U.S. survey is cited, the lowest and highest acceptance rates in the state surveys were as follows: should test safety-sensitive positions: (97 percent, highest — Georgia, 92 percent, lowest — Washington); should test factory workers: (87 percent, highest — Georgia, 64 percent, lowest — Massachusetts); should test office workers (75 percent, highest — Georgia, 46 percent, lowest — Massachusetts).

[56] *See also*, Equifax, Inc. 1990. (83 percent and 66 percent of employees favored preemployment and universal random testing respectively) Daily Labor Report, Bureau of National Affairs, June 12, 1990, at A-14; Industry Week Readership Survey 1992. (In 1990, 93 percent of those surveyed thought their company should test (up from 88 percent in 1988)). Michael Verespej, *Drug Users — Not Testing — Anger Workers: Resistance to Workplace Testing May be a Thing of the Past*, Industry Week, February 17, 1992, at 33.

[57] *Winning the War on Drugs — Check the Military*, *supra*, at 4.

[58] Michael Leroy, *Discriminating Characteristics of Union Members' Attitudes Toward Drug Testing in the Workplace*, 12 J. Lab. Res. 453 (1991).

Employee support of urinalysis drug testing is testimony to its effectiveness as a deterrent and as a means of detection. Employees are the group that has been required to undergo the most testing, and would therefore seem to be the most likely to oppose or resent urinalysis drug testing — *if* it were inappropriate. To the contrary, employees as a whole accept urinalysis drug testing because they recognize its necessity to ensuring safety, getting treatment to drug-dependent co-workers, and deterring other people from becoming drug abusers.[59]

Conclusion

The Institute respectfully urges the Court to consider the pervasiveness of the drug-abuse problem in the United States and the devastating harm caused by drug abuse in determining the need for drug testing in public schools and their athletic programs, such as Petitioner's.

Furthermore, the Institute respectfully submits that, over the last decade, urinalysis drug testing has become so widely used and accepted in the private-sector work force, and its procedures so well refined, that the urine specimen collection process intrudes only minimally on an individual's legitimate privacy expectations.

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[59] In the national U.S. survey conducted for the Institute by the Gallup Organization, workers who supported a drug-testing policy were asked why they supported it. Some of the most frequently given reasons were to increase safety, stop drug abuse, help others on drugs, and deter new users. *Survey of 1,007 Full-Time Employees, Aged 18 and Older, Working Outside of the Home*, *supra*.

Finally, and most importantly, the Institute asks the Court to reaffirm the appropriateness of drug testing as a deterrent and as a means of detection in combatting drug abuse in the United States.

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